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Emmanuel Yaw Teiku v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–28 OF 2003(K)

B AHMAD FAIRUZ CHIEF JUCTICE, PS GILL AND RICHARD MALANJUM FCJJ

16 MAY 2006

C *Criminal Law — Dangerous drugs — s 39B(1)(a) — Trafficking — Whether trial judge erred in applying prima facie test at the end of prosecution's case instead of the 'beyond reasonable doubt' test after maximum evaluation of the evidence adduced by the prosecution at the close of its case — Whether knowledge of appellant as to the nature of contents of capsules vis-a-vis actual possession was proved — Dangerous Drugs Act 1952*

D *s 39B(1)(a)*

The appellant came to the inspection counter of the Customs Office. His belongings were searched but nothing was found. A body search was then conducted on him

E resulting in the discovery of some Imodium and Mottilium pills on him. As a result of the finding the appellant was taken to the hospital for further search. At first, the appellant was reluctant but later agreed to be x-rayed. From the x-ray films of his abdomen several foreign objects were seen present in his large and small intestines. He was therefore placed in a special room and given laxative pills. On the third day,

F the foreign objects were excreted. They consisted of 84 capsules suspected to contain heroin. These were sent to the Chemistry Department for analysis. The result of the analysis confirmed that the contents of the capsules were heroin with the total weight of 515.7 grams. It was also confirmed by the chemist who carried out the analysis that the heroin found came within the First Schedule of the Dangerous Drugs Act 1952 ('the Act'). The appellant was charged for trafficking under s 39B(1)(a) of the

G Act, tried and was found guilty as charged. He was sentenced to death. The appellant appealed on two grounds, namely, that: (i) the learned trial judge erred in applying the prima facie test at the end of the prosecution's case instead of the 'beyond reasonable' test after maximum evaluation of the evidence adduced by the prosecution at the close of its case; and (ii) knowledge of the appellant as to the

H nature of the contents of the capsules vis-a-vis actual possession, was not proved.

Held, dismissing the appeal:

I (1) The test applied by the learned trial judge was within the requirement of Criminal Procedure Code as amended. In using the terminology *prima facie* did not mean the learned judge had evaluated the evidence of the prosecution less than the standard test of 'beyond reasonable doubt'. From the evidence made available in the record it is clear that the learned trial judge, when he concluded that the prosecution had established a prima facie case, had applied

the stringent test of 'beyond reasonable doubt' (see paras 6, 10); *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 and *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 followed.

(2) Under the Act there is no mandatory rule to require for the invocation of s 37(d) of the Act to establish the element of possession on a charge for trafficking of dangerous drug. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced. As to the nature or kind of evidence required to show knowledge it would depend on the facts and circumstances of each case (see para 14).

(3) The dangerous drugs were found in the stomach of the appellant. His conduct of initially refusing to undergo x-ray procedure should indicate his knowledge of what was inside his body (see para 15). It is inconceivable that the appellant would have failed to realize the sheer weight difference between gold dust and the substance found inside the capsules. The substance was in powdery form when the capsules were opened up. A half kilogram of gold dust would definitely be heavier than the same quantity of the powdery substance (see para 16).

[Bahasa Malaysia summary

Perayu telah datang ke kaunter pemeriksaan Pejabat Kastam. Pemeriksaan telah dilakukan ke atas barangannya. Tiada apa ditemui. Pemeriksaan badan kemudian telah dilakukan ke atasnya yang mana telah ditemui beberapa Imodium dan pil Mottilium daripadanya. Akibat penemuan ini perayu telah dibawa ke hospital untuk pemeriksaan selanjutnya. Pada mulanya perayu enggan untuk melakukan sinar-X atas sebab kesihatan. Setelah beberapa penjelasan, beliau bersetuju. Daripada filem x-ray abdomennya beberapa objek asing dilihat wujud dalam usus besar dan kecilnya. Beliau kemudian diletakkan dalam bilik khas dan diberikan pil pelawas. Pada hari ketiga objek asing itu dapa dikeluarkan. Ia terdiri daripada 84 kapsul yang disyaki mengandungi heroin. Ini dihantar ke Bahagian Kimia untuk dianalisis. Hasil analisis itu mengesahkan bahawa kandungan kapsul tersebut adalah heroin dengan berat keseluruhannya 515.7g. Ia juga disahkan oleh ahli kimia yang menjalankan analisis itu bahawa heroin yang ditemui terangkum dalam Jadual Pertama Akta Dadah Berbahaya 1952 ('Akta tersebut'). Perayu telah dituduh mengedar di bawah s 39B(1)(a) Akta tersebut, telah dibicarakan dan didapati bersalah seperti dituduh. Beliau telah dijatuhkan hukuman mati. Perayu telah merayu atas dua alasan, iaitu, bahawa: (i) hakim perbicaraan yang bijaksana terkhilaf apabila menggunakan ujian prima facie di akhir kes pihak pendakwa dan bukan ujian 'beyond reasonable' selepas penilaian maksimum keterangan yang dikemukakan oleh pihak pendakwa di penutup kesnya; dan (ii) pengetahuan perayu berhubung sifat kandungan kapsul tersebut berkaitan pemilikan sebenar, tidak dibuktikan.

Diputuskan, menolak rayuan tersebut:

(1) Ujian yang digunakan oleh hakim perbicaraan yang bijaksana memenuhi keperluan Kanun AAcara Jenayah seperti yang dipinda. Dengan menggunakan

terminologi prima facie tidak bermakna hakim yang bijaksana telah meneliti keterangan pihak pendakwa kurang daripada ujian standard 'beyond reasonable doubt'. Berdasarkan keterangan yang sedia ada dalam rekod adalah jelas bahawa hakim perbicaraan yang bijaksana, apabila beliau memutuskan bahawa pihak pendakwa telah membuktikan satu kes prima facie, telah menggunakan ujian ketat 'beyond reasonable doubt' (lihat perenggan 6, 10); *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 dan *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 diikut.

(2) Di bawah Akta tersebut, tiada rukun mandatori yang menghendaki digunakan s 37(d) Akta tersebut untuk membuktikan elemen pemilikan atas pertuduhan pengedaran dadah berbahaya. Di mana fakta-fakta dan keadaan mewajarkan, ia adalah memadai untuk membuktikan pemilikan dan juga pengetahuan sebenar berdasarkan keseluruhan keterangan yang dikemukakan. Berhubung sifat atau jenis keterangan yang diperlukan untuk menunjukkan pengetahuan itu bergantung kepada fakta-fakta dan keadaan setiap kes (lihat perenggan 14).

(3) Dadah berbahaya telah ditemui dalam perut perayu. Perbuatannya yang pada mulanya enggan menjalani prosedur x-ray menunjukkan pengetahuannya tentang apa yang ada dalam badannya (lihat perenggan 15). Ia tidak boleh diterima bahawa perayu gagal menyedari perbezaan berat antara serbuk emas dan bahan yang ditemui dalam kapsul tersebut. Bahan itu berbentuk serbuk semasa kapsul tersebut dibuka. Setengah kilogram serbuk emas sepastinya lebih berat daripada kuantiti sama bahan serbuk itu (lihat perenggan 16).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 290–391.

Cases referred to

Abdul Manap bin Mohamad Hassan v Public Prosecutor [2003] 4 MLJ 374 (refd)
Balachandran v PP [2005] 2 MLJ 301 (folld)
Basil bin Omar v Public Prosecutor [2003] 1 MLJ 192 (refd)
Chan Pean Leon v Public Prosecutor [1956] MLJ 237 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (folld)
Tunde Apatira & Ors v Public Prosecutor [2001] 1 MLJ 259 (refd)
Wong Nam Loi v Public Prosecutor [1997] 3 MLJ 795 (refd)

Legislation referred to

Criminal Procedure Code
Dangerous Drugs Act 1952 ss 37(d), 37(da)

Appeal from: Criminal Appeal No K-0537 of 2001 (Court of Appeal, Kuala Lumpur)

Ponmugam Ponnan (Ponmugam & Co) for the appellant.
Noorin Bararuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Richard Malanjum FCJ (delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of Appeal given on 5 September 2003 affirming his conviction and sentence of death by the High Court Alor Setar Kedah on a charge which reads:

> Bahawa kamu pada 13 Disember 1997 lebih kurang jam 11.30 pagi di Hospital Daerah Jitra, di dalam Daerah Jitra, di dalam negeri Kedah Darulaman, bagi pihak diri kamu sendiri telah mengedar dadah berbahaya iaitu 515.7g heroin dan ia merupakan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234 Semakan 1980) dan kamu boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] Briefly,the facts of this case as found by the High Court are as follows:

> On the morning of 12 December 1997 at around 8am, the appellant came to the inspection counter of the Customs Office at Bukit Kayu Hitam. Search was conducted on his belongings. Nothing was found. Bodily search was then conducted on him resulting in the finding of some Imodium and Mottilium pills from his trousers pocket. As a result of the finding the appellant was brought to the Jitra District Hospital for further search. At first the appellant was reluctant to be x-rayed on the ground of his health. With some explanations, he later acceded. From the x-ray films of his abdomen, several foreign objects were seen present in his large and small intestines. He was therefore placed in a special room and given laxative pills. On the third day, the foreign objects were excreted. They consisted of 84 capsules suspected to contain heroin. These were sent to the Chemistry Department Penang for analysis. The result of the analysis confirmed that the contents of the capsules were heroin with the total weight of 515.7g. It was also confirmed by the chemist who carried out the analysis that the heroin found came within the First Schedule of the Dangerous Drugs Act 1952 ('the Act'). Accordingly the appellant was charged for trafficking under s 39B(1)(a) of the Act, tried and found guilty as per charge. He was sentenced to death, a mandatory sentence under the Act.

[3] During the trial at the court of first instance, the prosecution adduced evidence of actual possession of the heroin by the appellant without resorting to the presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the Act'). Thereafter the presumption of trafficking under s 37(da) of the Act was invoked since the heroin found exceeded 15g. At the close of the prosecution's case, the learned trial judge found that there was prima facie case made out against the appellant. He was therefore called to enter upon his defence.

[4] Basically, the defence raised by the appellant at the trial was his ignorance of the contents of those capsules. He testified that he was carrying the capsules on behalf of one Bright Owusu and he thought the contents were gold dust since he had done the same in two previous occasions albeit by different mode. The learned trial judge did not believe his version and at the end of the hearing and having considered the evidence adduced as a whole he was satisfied that the defence failed to raise any reasonable doubt and that the prosecution had proved its case beyond reasonable doubt thus finding the appellant guilty as charged.

[5] On appeal to the Court of Appeal, several grounds were raised, inter alia, the failure by the learned trial judge to give reasons as to why a prima facie case as per charge had been made out against the appellant at the close of prosecution's case. It was also submitted that despite the amendment to the Criminal Procedure Code on the standard of proof required at the end of prosecution's case, namely, on prima facie only, the test to be applied would be one of beyond reasonable doubt. Another argument advanced was that to constitute actual possession the prosecution must establish knowledge on the part of the appellant.

[6] The Court of Appeal was not persuaded by the arguments advanced on behalf of the appellant. On the issue of the test to be applied at the end of the prosecution's case, the Court of Appeal said this:

> In using the terminology (ie prima facie as used in the Criminal Procedure Code (CPC) and applicable to this case being post-amendment of s 180 CPC), it does not mean the learned judge had evaluated the evidence of the prosecution less than the standard test of 'beyond reasonable doubt'. From the evidence made available in the record, it is clear to us that the learned judge, when he concluded that the prosecution had established a prima facie case, had applied the stringent test of 'beyond reasonable doubt'.

[7] On the issue of knowledge of the appellant as to the contents of the capsules, the Court of Appeal said in its judgment:

> … it is clear to us that knowledge of the appellant in respect of the 84 capsules containing the drug, could only be inferred from his behaviour and the surrounding circumstances as at the close of the prosecution's case. We see no reason why the learned trial judge in the present appeal should not make the necessary inferences as he had stated in the above passages. It is trite law that knowledge could not be seen but could be inferred from one's behaviour.
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> …
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> We agreed with the learned trial judge that the reluctance of the appellant to have his abdomen x-rayed was because he knew of the contents of the capsules. It was obvious that the swallowing of 84 capsules could not be mistaken with the swallowing of medicines because of the large quantity of capsules swallowed. It is obvious to us that he was not forced to swallow those capsules. In our view, the appellant must have swallowed those capsules himself which show that he had handled the capsules himself. In our view, the learned judge came to the correct conclusion after evaluating the evidence that the appellant knew what were the contents in those capsules.

[8] In respect of the assertion by the appellant that the capsules belonged to one Bright Owusu of Cairo, the Court of Appeal did not interfere with the conclusion of the learned trial judge that it was just a fictitious character. The Court of Appeal was also of the view that the statement by the learned trial judge on the failure by the appellant to call the alleged Bright Owusu did not amount to making an adverse inference 'but to justify his conclusion that Bright Owusu was a fictitious character and did not exist'.

[9] Before us learned assigned counsel for the appellant marshaled two points, namely, that:

(i) the learned trial judge erred in applying the prima facie test at the end of the prosecution's case instead of the 'beyond reasonable doubt' test after maximum evaluation of the evidence adduced by the prosecution at the close of its case; and

(ii) knowledge of the appellant as to the nature of the contents of the capsules vis-a-vis actual possession, was not proved.

[10] In respect of the first point, we are inclined to agree with the learned Deputy Public Prosecutor that the test applied by the learned trial judge was within the requirement of CPC as amended. We also agree with the reasoning given by the Court of Appeal as reproduced hereinabove. Indeed this point is now settled by the series of decisions of this court as well as the Court of Appeal (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65). We therefore find no merit on this first point.

[11] As regards knowledge vis-a-vis actual possession we have given it our anxious consideration. We are inclined to agree with the view expressed by the Court of Appeal as reproduced hereinabove.

[12] In fact, on the subject of actual possession vis-a-vis the Act, we need only to refer to some instructive cases. In *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, this court had this to say:

> There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the learned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. The learned trial judge found the appellants' version of how they had come to swallow the drugs in question as being implausible. The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the prescribed drug at the time of their initial detention. It follows that even if the learned trial judge and the learned judges of the Court of Appeal had directed themselves in accordance with the law as laid down by the court in Muhammed bin Hassan they would have arrived at the identical conclusion. To put it in another fashion, a reasonable tribunal arrived with the same facts and properly directing itself would have concluded that the appellants were found in actual possession of the heroin in question, that is to say, independently of the presumption in s 37(d) of the Act. Since the quantity so found in the possession of appellants was several times greater than the statutory minimum of 15g, the court was entitled to conclude that they were trafficking in the said drug.

[13] Similar point was made by the Court of Appeal in *Abdul Manap bin Mohamad Hassan v Public Prosecutor* [2003] 4 MLJ 374 with this statement (at p 382):

> Our observation of the above judgment makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption under s 37(d) of the Act. If a trial judge invoke s 37(d) of the Act to establish possession even though there was evidence of actual possession and then went on to invoke s 37(da)

> to establish trafficking, it would be a serious misdirection. We would like to stress this point because time and again, DPPs in their submissions before us have requested this court to look into the totality of the evidence to establish actual possession even though the learned trial judges in their judgments invoked the presumptions under s 37(d) to establish possession and s 37(da) to establish trafficking. Following the decision of *Haryadi bin Dadeh v PP* [2000] 4 MLJ 71, the Federal Court makes it very clear that even though there is evidence of actual possession on the part of an accused person, and despite that the learned judge invokes s 37(d) to establish possession and then goes on to invoke the presumption under s 37(da) to establish trafficking the learned judge had misdirected himself and in such a situation an accused person should be given the benefit of the doubt. The accused person should be found guilty of the offence of possession only.

[14] Hence, under the Act there is no mandatory rule to require for the invocation of s 37(d) to establish the element of possession on a charge for trafficking of dangerous drug. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced. As to the nature or kind of evidence required to show knowledge it would depend on the facts and circumstances of each case. For instance, in *Tunde Apatira & Ors*, the drugs were found 'in packets within the stomachs of the appellants' and the version of the appellant was found to be implausible by the trial judge. This court agreed that the totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the proscribed drug at the time of their initial detention'. In another case of *Basil bin Omar v Public Prosecutor* [2003] 1 MLJ 192, the Court of Appeal in answer to the issue of whether the accused had actual possession of the impugned drugs said this at p 197:

> On conduct of the accused, the evidence established the following:
>
> (i) on sighting the roadblock, the accused told the taxi driver (PW4) to turn the taxi back to town; the accused covered the bag with his jacket; the accused tried to run away and on being stopped, the accused put up a struggle.
>
> From the conduct and surrounding circumstances of the case, the irresistible inference is that the accused must have had knowledge of the impugned drugs inside the bag. On this issue, our finding is in the affirmative.

[15] Reverting to the present case, the facts are similar to that of *Tunde Apatira & Ors*. The dangerous drugs were found in the stomach of the appellant. His conduct of initially refusing to undergo x-ray procedure should indicate his knowledge of what was inside his body. It should be borne in mind that proof of intention or knowledge is generally inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself. This difficulty had been acknowledged in the case of *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 when Thomson J said this (at p 239):

> Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

(See also *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795)

[16] We are also in agreement with the observation by the trial judge and the Court of Appeal in that it is inconceivable that the appellant would have failed to realize the sheer weight difference between gold dust and the substance found inside the capsules. The substance was in powdery form when the capsules were opened up. A half kilogram of gold dust would definitely be heavier than the same quantity of the powdery substance.

[17] Accordingly, we are not persuaded that the learned trial judge and the Court of Appeal had erred in their analysis of the evidence adduced and the application of the relevant principles of law thereto.

[18] On the contrary, we find no miscarriage of justice in the disposal of this case as to warrant our interference in the conclusion and verdict of the court below.

[19] This appeal is therefore dismissed and we affirm the conviction and sentence meted out by the learned trial judge upon the appellant.

Appeal dismissed.

Reported by Peter Ling